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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:

GIGA WATT, Inc., a Washington
corporation,

Debtor.

Case No. 18-03197 FPC 11

The Honorable Frederick P. Corbit

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
TRUSTEE'S MOTION FOR ORDER
SETTING INTERIM PAYMENT
PROCEDURE**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER SETTING MONTHLY INTERIM PAYMENT
PROCEDURE

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1 Mark D. Waldron, in his official capacity as the Chapter 11 Trustee (the
2 “Trustee”) hereby respectfully submits this memorandum of points and authorities
3 in support of the *Trustee’s Motion for Order Setting Monthly Interim Payment*
4 *Procedure* (the “Motion”) pursuant to which the Trustee requests permission to
5 cause the Debtor to pay his fees on a monthly basis up to \$15,000 per month and
6 to reimburse expenses on a monthly basis subject to the following procedure (the
7 “Monthly Interim Payment Procedure”):

8 1. Each month, the Trustee will file and serve, as set forth below, a
9 notice stating the amount of fees and expenses that he accrued in the calendar
10 month prior (the “Notice of Monthly Interim Fee Statement”).

11 2. The Trustee will file and serve the Notice of Monthly Interim Fee
12 Statement upon all parties who have registered to participate in Electronic Court
13 Filing (the “Monthly Notice Parties”).

14 3. The Monthly Notice Parties will have ten (10) days from the date of
15 service of the Notice of Interim Fee Statement to file and serve upon the Trustee
16 and undersigned counsel an objection to the proposed fees.

17 4. If no timely objection is filed with the Court, then the Trustee may
18 cause the Debtor to pay the Trustee up to the sum of \$15,000 for fees plus
19 expenses incurred; provided that if monthly fees are less than \$15,000, then the
20 Trustee will cause the Debtor to pay actual fees plus expenses.

21 5. The Trustee shall use his business judgment in deciding whether to
22 cause the Debtor to pay any portion of the monthly interim payments. If the

1 Trustee decides in the exercise of his business judgment that the Debtor should
2 not pay otherwise properly noticed fees, that unpaid interim allowed amount will
3 roll forward and will be payable at such time as the Trustee deems appropriate.
4 Furthermore, payment of the rolled forward amount will not count toward the
\$15,000 cap.

5 6. If a timely objection is filed with the Court and served upon the
6 Trustee and undersigned counsel, then the Trustee shall set the matter for hearing,
7 which may be on an expedited basis.

8 7. If a party objects to less than the full amount of the requested fees or
9 expenses set forth in the Notice of Monthly Interim Fee Statement, then the
10 Trustee may cause the Debtor to pay him the amount of fees to which there is no
objection up to the sum of \$15,000 plus expenses.

11 8. All fees and expenses will be subject to final review and approval
12 after notice and hearing pursuant to section 330 of title 11 of the United States
13 Code.

14 9. The Trustee shall disgorge any fees and expenses that have been paid
15 pursuant to the Monthly Interim Payment Procedure but that are not allowed on a
16 final basis.

17 By separate application, the Trustee has asked for interim approval of
18 \$95,244.26 in fees and for approval of reimbursement of \$5,235.80 in expenses
19 for the period January 2019 through September 2019. *See Application for Award*
20 *of Compensation for Service Rendered and Reimbursement of Expenses Pursuant*
21 *to 11 U.S.C. § 330, and for Approval of the Payment of Bank Fees* [ECF 384]. The

1 Trustee will cause the Debtor to pay approved fees and expenses only to the extent
2 that the Trustee believes it is financially prudent to do so.

3 **I. JURISDICTION, VENUE, AND BASES FOR RELIEF**

4 The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 157 and
5 28 U.S.C. §1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

6 Venue is proper in this district pursuant to 28 U.S.C. § 1408 and 28 U.S.C.
7 § 1409.

8 The statutory predicates for the relief requested are sections 105, 326, 330,
9 and 331 of title 11 of the United States Code (the “Bankruptcy Code”).

10 **II. BANKRUPTCY PROCEEDINGS**

11 On November 19, 2018, Giga Watt, Inc. (the “Debtor” or “Giga Watt”)
12 commenced this case by filing a voluntary petition for relief pursuant to sections
13 101 of the Bankruptcy Code.

14 On January 23, 2019, the Court approved the appointment of Mark D.
15 Waldron as the Trustee pursuant to its *Order Approving Appointment of Chapter*
16 *11 Trustee* [ECF No. 146].

17 On May 10, 2019, the Court approved the re-opening of a portion of the
18 Moses Lake Facility pursuant to its *Order Granting Chapter 11 Trustee’s Motion*
19 *for Order Approving Agreement with Moses Lake Landlords* [ECF No. 300]. On
20 May 20, 2019, the Court approved the re-opening of another portion of the Moses
21 Lake Facility, pursuant to the *Order Granting Chapter 11 Trustee’s Motion for*
22

1 *Order Approving Moses Lake Three-Way Agreement* [ECF No. 309], dated May
2 20, 2019. Currently, all of the Moses Lake Facility is up and running except for
3 two pods. A third party has asserted an interest in one of the two unopened pods.
4 The Trustee contests this party's assertion and is currently attempting to negotiate
5 with this party.

6 On June 5, 2019, the Court entered its *Order Granting Preliminary*
7 *Injunction* [AP ECF No. 70] which, *inter alia*, granted management and control of
8 the TNT Facility to the Trustee.

9 Pursuant to an Order, dated August 29, 2019, [ECF No. 365], the Court
10 authorized the Trustee to reopen the TNT Facility. Pursuant to an Order, dated
11 September 30, 2019 [ECF No. 380], the Court approved on a final basis the
12 Trustee's request to borrow \$200,000 on a superpriority unsecured basis in order
13 to re-open the TNT Facility. Operations have begun at the TNT Facility.

14 **A. Post-Petition Revenues and Disbursements**

15 Since his appointment, the Trustee has filed Monthly Operating Reports
16 which contain detailed information regarding the Debtor's post-petition revenues.¹
17 In summary, the Moses Lake Facility generated approximately \$400,000 in gross
18 revenues in each of June, July and August 2019. All current obligations are being
19

20 ¹ See Chapter 11 Trustee's Monthly Financial Report: February 2019 [ECF No.
21 271]; March 2019 [ECF No. 272]; April 2019 [ECF No. 301]; May 2019 [ECF
22 No. 326]; June 2019 [ECF No. 342]; July 2019 [ECF No. 352]; August 2019
[ECF No. 372].

1 met on a timely basis. The Trustee fully re-paid the loan made by the Moses Lake
2 Landlords. He has also caused the Debtor to pay more than \$1.5 million in past
3 due and current administrative rent. Currently, approximately \$51,000 in past due
4 administrative rent remains due and owing to the Moses Lake Landlords. The
5 revenue-sharing obligation to the Moses Lake Landlords will end when the past
6 due administrative rent is paid in full.

7 The Trustee has recently re-opened the TNT Facility.

8 The Trustee has distributed \$1,943,163.27 since his appointment through
9 September 30, 2109. The Trustee's fees accrued since his appointment on January
10 23, 2019, through September 2019 total \$95,244.26 as set forth more specifically
11 in the Application. For the same period, expenses total \$5,235.80. Based on
12 disbursements from May through September 2019, the average disbursements are
13 \$432,304.34 per month.² Based on the foregoing, the Trustee fee of 3% would be
14 \$12,969.13 per month.

15 III. POINTS AND AUTHORITIES

16 In *In re Knudsen Corp.*, 84 B.R. 668 (B.A.P. 9th Cir. 1988), the panel
17 approved a monthly payment procedure that is similar to the one proposed here.
18 The procedure applied to counsel and the debtor's accountant. *Id.* at 670. In this
19 case, the procedure will apply to the Trustee. When the estate is generating
20

21
22 ² Disbursements for the months of January through April 2019 are not included in
the average because there were no operations during that time.

1 sufficient revenue, the Trustee expects to request an interim payment procedure
2 for counsel for the Trustee and for the Official Committee of Unsecured Creditors.

3 *Knudsen's* approval of a similar interim payment procedure was based on
4 four specific factual criteria: (1) the case was unusually large; (2) an extended
5 waiting period for payment would place an undue hardship on the professional;
6 (3) the professional could respond to any reassessment; and (4) the fee retainer
7 procedure was subject to a noticed hearing prior to any payment. *Id.* at 672–673.

8 In *In re Mariner Post-Acute Network, Inc.*, 257 B.R. 723, 731 (Bankr. D.
9 Del. 2000), the court agreed with the *Knudsen* analysis but refused to limit
10 instances where interim compensation procedures should be adopted to only those
11 cases meeting the four-part *Knudsen* test. The court noted that other factors were
12 relevant to a determination of whether an interim compensation procedure is
13 appropriate. Those factors include “whether other fee arrangements would impose
14 a hardship on the debtor,” “the effect of the proposed procedure on the ability of
15 the Court to adequately review professional fee applications,” “the payment
16 arrangement's economic impact on the ability of the debtor's ongoing business
17 operation, the ability of the debtor to reorganize, or the reputation of debtor's
18 counsel.” *Id.* at 731. *See also In re ACT Mfg., Inc.*, 281 B.R. 468, 477–78 (Bankr.
19 D. Mass. 2002) (discussing and surveying the case law).

20 In *Knudsen*, as in this case, the interim compensation procedure expressly
21 provided for review and opportunity to object to final approval of any fees and
22

1 expense reimbursement. This procedure satisfied the Bankruptcy Code's policy of
2 requiring transparency regarding fees. *See Knudsen*, 84 B.R. at 672 ("The fee
3 application procedure and the notice and hearing requirement are not policies in
4 themselves; they are a method of implementing the Code's policy of having the
5 bankruptcy court scrutinize attorneys' fees in order to avoid overreaching and
6 waste of the estate's assets.").

7 The Panel also addressed the concern that qualified professionals might not
8 participate in the bankruptcy process absent these kinds of payment orders. It
9 stated:

10 [W]hen counsel must wait an extended period for
11 payment, counsel is essentially compelled to finance the
12 reorganization. This result is improper and may
13 discourage qualified professionals from participating in
14 the bankruptcy cases; a result that is clearly contrary to
15 Congressional intent.

16 *Knudsen*, 84 B.R. at 672. The panel affirmed the trial court's decision allowing
17 the interim payment procedure. All these factors and considerations apply here
18 and in favor of approval of the Monthly Interim Payment Procedure.

19 **A. The Monthly Interim Payment Procedure Is Appropriate**

20 The Monthly Interim Payment Procedure will allow the Trustee to receive
21 partial payment on a regular basis without compromising the Court's or any
22 interested party's right and ability to monitor the Trustee's fees and, if
23 appropriate, object. The Monthly Interim Payment Procedure allows the Monthly
24 Notice Parties to review the Monthly Interim Fee Statement each month and to

1 object. Furthermore, all fees paid pursuant to the Monthly Interim Payment
2 Procedure will be subject to further review and objection pursuant to a final fee
3 application.

4 The Monthly Interim Payment Procedure will also create more transparency
5 because it requires the Trustee to file and serve statements setting forth his fees
6 and expenses on a monthly basis. *Compare* 11 U.S.C. § 331 (providing for interim
7 compensation applications every four months). Furthermore, the Trustee will not
8 cause the Debtor to pay fees or expenses to the Trustee unless in his business
9 judgment such payments will not likely impair the estate's ability to continue to
10 pay down past due administrative expenses, meet current obligations, and
11 administer the case.

12 In addition to these important general considerations, each of the *Knudsen*
13 factors also apply.

14 1. The First *Knudsen* Criterion, Large and Complex Case, Is Met

15 Based on the claims registry, this case has 403 creditors with claims totaling
16 \$110,141,374.11. When the Trustee took over, post-petition revenues were
17 unaccounted for and operations were defunct. The Trustee and his team have
18 succeeded in (1) re-opening the Moses Lake Facility, (2) obtaining a preliminary
19 injunction to assert the Trustee's authority to re-open the TNT Facility for the
20 benefit of creditors, and (3) re-opening the TNT Facility. He is currently
21 rationalizing operations and analyzing plan options.

1 In addition to active reorganization efforts, the Trustee is litigating with the
2 Debtor's former CEO and investigating the unregistered securities offering that
3 the Debtor conducted in 2017.

4 Based on the foregoing, the Trustee requests that the Court find the first
5 *Knudsen* criterion is present.

6 2. The Second *Knudsen* Criterion, Hardship, Is Met

7 The Trustee has not been paid since his appointment nine months ago. The
8 Trustee is a sole practitioner. His office has paid \$5,235.80 in expenses on behalf
9 of the estate. He has also devoted significant time and energy to his successful
10 efforts in the case to date. It would work a hardship on the Trustee to have to
11 continue to work and advance expenses without monthly payment and to have to
12 devote limited resources to filing an interim fee application every four (4) months.

13 The Monthly Interim Payment Procedure will alleviate the hardship on the
14 Trustee without compromising either the reorganization effort or the Court's and
15 parties' interest in reviewing fees. The Trustee will not cause the Debtor to pay
16 him any fees or expenses unless in his business judgment it is prudent to do so.
17 And, as set forth above, the procedure provides an opportunity for parties to
18 object.

19 Based on the foregoing, the Trustee requests that the Court find that the
20 second *Knudsen* criterion is present.

1 Based on the foregoing, the Trustee requests that the Court find that this
2 Notice is sufficient and proper, and that the fourth *Knudsen* criterion is present.

3 **IV. CONCLUSION**

4 WHEREFORE, the Trustee respectfully requests that the Court grant the
5 Motion.

6 Dated: October 9, 2019

POTOMAC LAW GROUP

7
8 By: /s/ Pamela M. Egan
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9 *Attorneys for Mark D. Waldron, Chapter 11*
10 *Trustee*